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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS JOSEPH GOOLSBY,

Defendant and Appellant.

D073368

(Super. Ct. Nos. SCS218940;  
SCD270841)

APPEAL from an order of the Superior Court of San Diego County, Timothy R. Walsh, Judge. Vacated with directions.

Cathryn Lintvedt Rosciam, under appointment by the Court of Appeal, for  
Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney  
General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Alan L.  
Amann, Deputy Attorneys General, for Plaintiff and Respondent.

In 2017, without notice to Thomas Joseph Goolsby, the superior court added 521 days to his prison sentence and imposed a \$300 restitution fine by ex parte order (the ex parte order). Goolsby appeals, asserting that the ex parte order violates his due process right to be present and heard before sentencing. We agree and, therefore, vacate the ex parte order and remand with directions to address numerous alleged errors that occurred before the ex parte order.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. *The 2006 Case*

In 2006, Goolsby pleaded guilty to attempted murder and battery in San Diego County Superior Court case No. SCD191589 (the 2006 case). The court sentenced him to prison.<sup>1</sup>

### B. *The 2008 Plea Agreement and Sentence*

In 2008, while in prison, Goolsby allegedly stabbed an inmate. In San Diego County Superior Court case No. SCS218940, the People charged Goolsby with assault with a deadly weapon by a state prisoner (Pen. Code, § 4501;<sup>2</sup> count 1) and possessing a deadly weapon at a penal institution (§ 4502, subd. (a); count 2; the 2008 case).

Goolsby pleaded guilty to count 2 in exchange for a two-year sentence and dismissal of the remaining charges (the 2008 plea agreement). The guilty plea form is

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<sup>1</sup> The record does not contain the oral pronouncement of sentence in the 2006 case, nor the abstract of judgment. Goolsby contends there is "conflicting hearsay information" about whether his prison term was nine or 14 years. The Attorney General emphatically states the sentence was 14 years. We need not and do not resolve that issue.

<sup>2</sup> Undesignated statutory references are to the Penal Code.

silent about whether (1) the two years would be concurrent or consecutive to the term Goolsby was serving in the 2006 case, and (2) credit for time served is part of the agreement. When taking Goolsby's plea, the court (the Hon. Esteban Hernandez) stated that the two-year term "would be imposed consecutive" to Goolsby's 2006 sentence. Asked, "Is that correct?", Goolsby replied, "Yes, sir."

Six months later Goolsby was sentenced by a different judge (the Hon. Timothy R. Walsh). Judge Walsh stated that he had "read and considered the change of plea form" and "the probation officer's report and recommendation" and "[b]oth seem to point to the fact this is a stipulated two-year deal." The court stated, "I'm going to honor the bargain and the deal. That's two years state prison." The court stated, "All right. *Concurrent with parole violation.*" (Italics added.)<sup>3</sup> The probation officer ended the hearing by stating, "Your Honor, the updated credits are 199 and 98 for a total of 297."<sup>4</sup>

The next day the clerk filed an abstract of judgment showing that the court (1) imposed a two-year term by plea that was "to run concurrent with parole violation"; and (2) awarded 297 presentence credits.

### *C. The Department of Corrections and Rehabilitation Finds Sentencing Errors*

In January 2009, the Department of Corrections and Rehabilitation (Department) identified two sentencing errors in a document entitled "LPU Documents Transmittal"

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<sup>3</sup> There was no parole violation. Goolsby was in prison on the 2006 case.

<sup>4</sup> The probation report does not indicate whether the two-year term was to be consecutive or concurrent. The probation report states Goolsby was entitled to certain presentence credits, but does not state whether credits were a term of the plea agreement.

(Transmittal): (1) the two-year term for violating section 4502, subdivision (a) must be consecutive; and (2) custody credits were granted "in error." The record does not indicate that the Department sent the Transmittal to the court or to counsel.

*D. Goolsby's Initial Efforts to Clarify His 2008 Sentence*

A few months later, Goolsby saw the Transmittal in his prison file. Concerned about the legality of his plea, Goolsby filed three unsuccessful requests in the superior court for a reporter's transcript of his change of plea and sentencing hearings. In his last request in December 2011, Goolsby explained that he needed the transcripts to resolve "confusion" about whether his term was to be consecutive or concurrent, and custody credits. The court (the Hon. George W. Clarke) denied that request on the grounds that "defendant's term [was] to be served concurrent to parole violation."

*E. The Department's 2016 Letter*

In April 2016—*seven years* after sentencing in the 2008 case—the Department notified the superior court that: (1) section 4502, subdivision (a) required Goolsby's 2008 sentence to be consecutive to his 2006 sentence; and (2) Goolsby was not entitled to presentence credits because he was serving a prison sentence in the 2006 case when the 2008 case was pending.<sup>5</sup> The court set a hearing.

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<sup>5</sup> Section 4502, subdivision (a) provides that the punishment for possessing a weapon in prison is "two, three, or four years, to be served *consecutively*." (Italics added.) *In re Rojas* (1979) 23 Cal.3d 152, 154 (*Rojas*) holds that a defendant is not entitled to credit toward his sentence for a period of presentence time spent in custody, if during that same period the defendant was simultaneously serving a prison term for a prior unrelated offense.

#### *F. Goolsby's Response*

In response Goolsby asserted that he only agreed to the 2008 plea because he was promised a concurrent sentence. Goolsby threatened to withdraw his 2008 plea if the court changed any part of that sentence, and he insisted on being present at any new sentencing hearing.

#### *G. The People's Motion to Correct Goolsby's Sentence*

The People took the opposite position. First, the People asserted that in 2008 "this [c]ourt did not specifically state on the record that the 2 year term should be served consecutively or concurrently."<sup>6</sup> The People urged the court to correct the "misunderstanding or clerical error" in the abstract of judgment by sentencing Goolsby to a consecutive term under "[s]ection 4501[, subdivision ](b)."<sup>7</sup>

#### *H. Goolsby's Motion to Withdraw His 2008 Plea*

In January 2017, Goolsby filed motions to discharge his appointed attorney and to withdraw his guilty plea.<sup>8</sup> He asserted that the 2008 plea agreement was for a two-year concurrent term with custody credits. In an accompanying declaration, Goolsby explained:

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<sup>6</sup> This is incorrect; at sentencing, the court stated that the two-year term was "concurrent with parole violation."

<sup>7</sup> This is incorrect. Goolsby did not plead guilty to violating section 4501, subdivision (b). He pleaded guilty to violating section 4502, subdivision (a). This error, fortunately, is inconsequential because section 4502, subdivision (a) also requires consecutive sentencing.

<sup>8</sup> In February 2017, the court granted his motion for self-representation.

"The deal was 2 years, strike both my strikes to make me eligible for . . . credits, which would be '[run] with' my current prison term. I said, 'So I won't have to do anymore extra time?' The response was, 'Right. You'll get another conviction, but no extra prison time than you are already doing.' . . . On the basis of this deal, for 2 years 'run with' my [c]urrent term and jail custody credits, I agreed to the plea bargain.

"At the plea hearing, the judge said 2 years consecutive, I didn't know what that meant, so I erroneously agreed to it. I asked my attorney about it at the time and she said we'll fix [it] at my sentencing.

"On December 8, 2008, I was sentenced to my deal of [2] years concurrent with 297 jail custody credits. The D.A. never [o]bjected to any of the terms of the agreement."

Goolsby requested an evidentiary hearing to determine whether the 2008 plea agreement (1) was for a concurrent or consecutive term, and (2) included presentence credits. He urged the court to examine the " 'totality of circumstances' " to determine the terms of his plea agreement.

Citing *In re Williams* (2000) 83 Cal.App.4th 936 (*Williams*), Goolsby stated that because presentence credit was a material term of the 2008 plea agreement, the court "cannot simply strike" them because so doing " 'materially changes the plea bargain.' " He conceded that the " 'concurrency provision' and the '297 custody credit' provision" made his negotiated sentence "illegal." For those reasons, Goolsby asked to withdraw his

guilty plea, have the charges reinstated, and "either negotiate a legal plea or go to trial . . . ."9

The People opposed Goolsby's motions and request for an evidentiary hearing, asserting that the transcript from the 2008 change of plea hearing conclusively established that the parties had agreed to a two-year *consecutive* sentence.<sup>10</sup>

There is no indication in the record that the court heard or ruled on Goolsby's motion to withdraw his plea or his request for an evidentiary hearing.

#### *I. Goolsby Is Charged with Another In-Prison Crime*

In February 2017, the People brought new in-prison charges against Goolsby in San Diego County Superior Court case No. SCD270841—two counts of possessing a weapon at a penal institution, in violation of section 4502, subdivision (a), stemming from Goolsby's possession of two loose razor blades (the 2017 case).

#### *J. Plea and Sentencing in the 2017 Case*

In April 2017, pursuant to a plea agreement, Goolsby pleaded guilty to one count of possessing a weapon in prison and admitted a strike prior, in exchange for a two-year sentence, doubled to four years for a prior strike—to run consecutively to the sentence Goolsby was already serving in the 2006 case. The court also imposed several fines and fees, including a \$154 booking fee, and an \$800 restitution fine. However, the court

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<sup>9</sup> Alternatively, Goolsby asserted that the Department's seven-year delay in notifying the court of the unauthorized sentence violated his due process rights and required the court to specifically enforce the unlawful sentence.

<sup>10</sup> The People's opposition ignored Goolsby's argument that presentence credit was also a material term of the 2008 plea agreement.

stayed all fines and fees pending successful completion of parole. The court also granted Goolsby 100 days of custody credits.

*K. Resentencing in the 2008 Case*

At the same hearing, the court resentenced Goolsby in the 2008 case, but did so without regard to the sentence imposed under the 2008 plea agreement. The court explained this to Goolsby, stating:

"We're . . . going to have to [resentence] you on the case from [2008]. And by law, it's going to be one-third the midterm additional to and consecutive to [the 2017 sentence]. It's not part of the deal, but it's a reality of your deal."

"[T]he law is such that I'm obligated, once you have a principle [*sic*] term exceeding that two years, to do a resentencing, which I'm going to do, which will cause the time that was previously concurrent in [the 2008 case] of two years, that was in error, to be sentenced consecutive as one year."

The court stated that it erred in 2008 when it sentenced Goolsby to a concurrent instead of a consecutive term. However, according to the court, the 2017 case "changed all that." The court told Goolsby that the plea-bargained 2008 sentence "has become moot . . . by virtue of you re-offending" in 2017. Designating the four-year sentence under the 2017 plea agreement as the "principle term," the court sentenced Goolsby in the 2008 case to a consecutive one-year term, consisting of one-third the midterm (of three years) for violating section 4502, subdivision (a).

The court added: "And whatever credits [Goolsby is] entitled to on that [2008] case, he'll get, and they'll follow." The clerk's minutes state, "The Defendant is to receive custody credits for his entire time at the [Department]."



The court acknowledged that Goolsby still claimed that he was entitled to concurrent sentencing under the 2008 plea agreement. The court noted that Goolsby had preserved those arguments for appeal, and in fact encouraged him to do so, stating, ". . . I would strongly encourage you to appeal what I've just done."

Subsequently, the clerk filed an abstract of judgment showing the court granted 421 days of presentence credit in the 2008 case. This was inconsistent with the Department's April 2016 letter, which stated that under *Rojas, supra*, 23 Cal.3d 152, Goolsby was not entitled to such credits. The abstract of judgment also indicated that the court imposed an \$800 restitution fine, which is inconsistent with the court's oral pronouncement staying all fines and fees.

*L. The Department's Letter Regarding Credits*

About three months later, in July 2017, the Department sent the court a letter, again explaining that under *Rojas, supra*, 23 Cal.3d 152, Goolsby was not entitled to presentence credits.

*M. The Restitution Fine in the Abstract of Judgment*

Meanwhile, Goolsby notified the court that the abstract of judgment erroneously reflected that the court had imposed an \$800 restitution fine. Goolsby explained that the Department was confiscating 55 percent of all money he received to satisfy that fine, which was causing him extreme hardship. Goolsby stated that he "knew what a hardship it is owing restitution. This is why [he] made such a 'big deal' about his condition to accept the 4 year plea deal in this case, only if no restitution was ordered."

In response, the court amended the abstract of judgment to state that all fines and fees were stayed in the 2017 case pending successful completion of parole/supervision.

N. *The Department's Letter Regarding the Restitution Fine*

In September 2017, the Department notified the court that its order staying the restitution fine was inadequate. The Department directed the court to section 1202.4, which provides that to stay the restitution fine, the court "must find[]compelling and extraordinary reason[s and] state on the record the reason there will be no restitution."

O. *Ex Parte Order Modifying 2008 and 2017 Sentencing*

On October 23, 2017, without notice to Goolsby, the court issued the ex parte order. The court struck the 421 days of presentence credit in the 2008 case and the 100 days' credit in the 2017 case. The court explained that under *Rojas, supra*, 23 Cal.3d 152, a defendant is not entitled to presentence credits if he was serving a prison term for an unrelated offense at the time of his presentence confinement. Because Goolsby was serving a prison sentence in the 2006 case when he was sentenced in the 2008 and 2017 cases, he was not entitled to any presentence credits on those cases.

The court also stated that it had "improperly" stayed the restitution fine in the 2017 case and now imposed a \$300 fine. The court explained that section 1202.4, subdivision (b) requires the court to impose a restitution fine unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record. The court stated that it did "not find or otherwise state on the record any compelling or extraordinary reasons for staying" the restitution fine. The court made this order nunc pro tunc to April 14, 2017—the sentencing date for both cases.

*P. Appeal and Petition for Writ of Habeas Corpus*

In his appeal from the ex parte order, Goolsby contends the superior court violated due process by eliminating 521 days of presentence credits and imposing a \$300 restitution fine—outside his presence and without affording him notice or the opportunity to be heard. He asks that the ex parte order be vacated and the matter remanded for resentencing. Goolsby states that he has several arguments to oppose eliminating presentence credits and to oppose the restitution fine; however, he asserts that this court need not resolve these issues on the merits, but instead simply hold that he has a right to present them to the trial court on remand. Additionally, Goolsby contends there may be grounds to withdraw his 2008 plea agreement; however, he again states that this court need not decide that point on the merits, but merely declare his right to present the argument on remand if he so chooses. Goolsby also contends that the \$154 booking fee should be stricken because the government has no " 'actual administrative costs' " in the 2017 case because he was already in custody.

Goolsby has also filed a petition for a writ of habeas corpus directly in this court, requesting that it be consolidated with this appeal.<sup>11</sup> Largely repeating his contentions on appeal, in the habeas petition Goolsby also asserts that he would not have entered into the 2017 plea agreement if he had known that the presentence credits would be stricken and the restitution fine imposed. He contends that we should vacate the ex parte order

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<sup>11</sup> We issued an order stating that the habeas petition and application to consolidate would be considered concurrently with this appeal.

and remand for an evidentiary hearing to resolve factual questions necessary to determine the merits of his sentencing claims and, if necessary, afford him an opportunity to withdraw his plea.<sup>12</sup>

## DISCUSSION

### I. *THE EX PARTE ORDER VIOLATES GOOLSBY'S DUE PROCESS RIGHTS*

#### A. *Due Process Right to be Present at Sentencing*

A defendant has a right to be present at critical stages of a criminal prosecution, a right protected by both the federal and state constitution. (*People v. Perry* (2006) 38 Cal.4th 302, 311.) This includes the right to be present at sentencing, which is "an essential and material phase of the criminal proceeding." (*People v. Arbee* (1983) 143 Cal.App.3d 351, 355 (*Arbee*).) This right also exists under section 977, subdivision (b)(1) which provides in part: "[I]n all cases in which a felony is charged, the accused shall be personally present at . . . the time of the imposition of sentence." Moreover, particularly apt in this case, a defendant "is entitled to due process in the award of credits, which in this context entails sufficient notice of the facts that restrict his ability to earn credits and, if he does not admit them, a reasonable opportunity to prepare and present a defense." (*People v. Lara* (2012) 54 Cal.4th 896, 906.)

The court violated Goolsby's due process rights by eliminating his presentence credits and imposing the restitution fine without giving him notice and a meaningful opportunity to oppose such sentencing changes. *Williams, supra*, 83 Cal.App.4th 936 is

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<sup>12</sup> Because we afford Goolsby complete relief in this appeal, by separate opinion we dismiss his habeas corpus petition as moot.

strikingly similar to the relevant facts here and compels the conclusion that the ex parte order must be vacated. In *Williams*, the defendant was serving a prison sentence when he escaped. (*Id.* at p. 939.) Subsequently, he pleaded guilty to escape in a plea agreement for, among other things, 194 days of presentence credit. (*Id.* at p. 940.) Later, the Department notified the trial court that the defendant was not entitled to such credits because he was serving a prison term for another offense when he was sentenced for escape. (*Id.* at pp. 940, 942.) Without notice to the defendant, the trial court in *Williams* entered an order nunc pro tunc eliminating his presentence credits. (*Id.* at p. 940.) The Court of Appeal in *Williams* granted the defendant's habeas corpus petition and remanded with directions to vacate the nunc pro tunc order, stating:

"Before the trial court could correct the sentence in accordance with the [D]epartment's suggestion, the matter should have been returned for a hearing with petitioner present. Striking the presentence credits materially changes the plea bargain and thus involves a liberty interest. [Citation.] Therefore, fundamental due process entitled petitioner to an opportunity to be heard before he could be deprived of the presentence credit he received when sentenced . . . ." (*Id.* at pp. 942, 946 [disposition].)

In this respect, Goolsby's case is indistinguishable from *Williams*, *supra*, 83 Cal.App.4th 936. Tellingly, although Goolsby's opening brief cites *Williams* repeatedly and claims that "Goolsby's case is nearly identical to *In re Williams*," the Attorney General's brief does not discuss *Williams*, much less try to distinguish it or explain why it should not be followed.

The due process requirement for a hearing on this issue in Goolsby's case is manifest. Whether 521 presentence credits were a material part of Goolsby's plea

agreements is a fact that can only be established by admissible evidence at a hearing. The same is true with respect to whether the parties agreed to stay the restitution fine. Absent a finding that presentence credits and a stay of the restitution fine were *not* terms of the plea agreements, the court cannot simply strike the credits, impose the fine, and enforce the remainder of the plea agreement without notice. In so doing, the court would be imposing a harsher sentence than the one for which Goolsby bargained. "When a guilty plea is entered in exchange for specified benefits . . . , both parties, including the state, must abide by the terms of the agreement. The punishment may not significantly exceed that which the parties agreed upon." (*People v. Walker* (1991) 54 Cal.3d 1013, 1024, overruled on other grounds by *People v. Villalobos* (2012) 54 Cal.4th 177, 183.)

Moreover, the due process violation was not remedied by making the ex parte order nunc pro tunc to the April 2017 sentencing. A trial court is empowered to correct clerical error to reflect the true facts. (*In re Candelario* (1970) 3 Cal.3d 702, 705.) This is often referred to as an order nunc pro tunc, and it has retroactive effect upon the prior order. But this power does not extend to correcting judicial errors. (*Ibid.*) Here, the court sought to correct judicial error, not clerical error, by nunc pro tunc order. The ex parte nunc pro tunc order purports to declare that the court had not awarded presentence credits when in fact that is precisely what it had done. The nunc pro tunc order purports to declare that the court imposed a \$300 restitution fine, when in fact the court stayed an \$800 fine. " [The] court can only make the record show that something was actually done *at a previous time*; a nunc pro tunc order cannot declare that something was done

which was not done.' " (*Johnson & Johnson v. Superior Court* (1985) 38 Cal.3d 243, 256.)

Disagreeing with this analysis and citing *People v. Shabazz* (1985) 175 Cal.App.3d 468 (*Shabazz*), *People v. Brite* (1983) 139 Cal.App.3d 950 (*Brite*), *People v. Macias* (1979) 93 Cal.App.3d 788 (*Macias*), *People v. Guillen* (1994) 25 Cal.App.4th 756 (*Guillen*), and *People v. Turrin* (2009) 176 Cal.App.4th 1200 (*Turrin*), the Attorney General contends that because the trial court was correcting a legally unauthorized sentence, the court could do so by nunc pro tunc order at any time. However, the cases on which the Attorney General relies are materially distinguishable.

In *Shabazz, supra*, 175 Cal.App.3d 468, the defendant pleaded guilty to forgery in exchange for a 16-month prison sentence. (*Id.* at p. 471.) Presentence credits were not a term of that plea agreement but were awarded "under an erroneous impression of law." (*Id.* at pp. 473, 474.) On those *undisputed* facts, the defendant's entitlement to credits was a question of law that the court could decide without a hearing because "the pertinent facts had been found at the time of the original sentencing when appellant had a hearing and was represented by counsel." (*Id.* at p. 474.)

In contrast here, whether presentence credit was a material term of the 2008 and/or 2017 plea agreements is a disputed factual issue. Goolsby filed a declaration in the trial

court stating that presentence credit was a material term of his 2008 plea agreement. Yet, the change of plea form is silent on this issue of credits.<sup>13</sup>

The Attorney General's reliance on *Brite*, *supra*, 139 Cal.App.3d 950 is misplaced for two reasons. First and foremost, there was no ex parte nunc pro tunc order in *Brite*. To the contrary, after the Department challenged the award of presentence credits in that case, the trial court conducted a hearing and "heard new arguments for a second recalculation of defendant's custody credits." (*Id.* at p. 954.) Second, presentence credits were not a material term of the plea bargain in *Brite*. (*Id.* at pp. 956-957.)

*Macias*, *supra*, 93 Cal.App.3d 788 is off point for the same reason—presentence credits were not part of the plea agreement. (*Id.* at p. 791, fn. 5.)

Reliance on *Guillen*, *supra*, 25 Cal.App.4th 756 is also unavailing. The conviction there was by verdict, not plea. (*Id.* at p. 760.) Moreover, the presentence credit issue in *Guillen* involved correcting a math error where "[t]he facts are not in dispute." (*Id.* at p. 764.) *Turrin*, *supra*, 176 Cal.App.4th 1200 is distinguishable for the same reason. There, the court explained that an unauthorized sentence can be corrected "at any time" only where it is " "correctable without referring to factual findings in the record or remanding for further findings." ' ' (*Id.* at p. 1205.)

Because the right to be present during all critical states of the proceedings is of federal constitutional dimension, remand is required here unless the violation of this right is harmless beyond a reasonable doubt. (*People v. Robertson* (1989) 48 Cal.3d 18, 62.)

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<sup>13</sup> Because *Shabazz* is factually distinguishable, it is unnecessary to address Goolsby's reply brief argument that *Shabazz* was wrongly decided.



We cannot say, beyond a reasonable doubt, that after conducting a properly noticed hearing, the court would determine that presentence credits and a stay of the restitution fine were not terms of the plea agreements. Goolsby established triable issues on both points. He submitted a declaration stating that "jail custody credits" was a material basis for his 2008 plea. In the 2017 case, Goolsby stated that having paid a restitution fine in his 2008 case, he "knew what a hardship it is owing restitution. This is why [he] made such a 'big deal' about his condition to accept the 4 year plea deal in this [2017] case, only if no restitution was ordered."

When the trial court violates the defendant's due process rights by amending the judgment by ex parte order, the proper remedy "is to remand the case for resentencing and accord the defendant a hearing in the trial court before the erroneously imposed sentence is to be modified." (*Arbee, supra*, 143 Cal.App.3d at pp. 355-356.) Because the modifications here occurred in Goolsby's absence, "the cause must be remanded for resentencing in order to give [Goolsby] an opportunity to present evidence and legal arguments prior to entering the new, modified sentence." (*Id.* at p. 356.)

Without intending to address every conceivable issue that might arise on remand, we now address some issues to assist the court and counsel on resentencing.

## II. ISSUES RELATING TO THE 2008 PLEA AGREEMENT

### A. *The Court Should Conduct an Evidentiary Hearing to Determine the Terms of the 2008 Plea Agreement*

A threshold issue is whether the parties agreed to a two-year consecutive or concurrent term in the 2008 plea agreement. In 2017, Goolsby asked for an evidentiary

hearing on this issue. The court should allow that motion to be refiled, and after conducting an evidentiary hearing on due notice, the court should make findings as to the material terms of the 2008 plea agreement.<sup>14</sup>

*B. The Court Should Determine if the 2008 Plea Agreement Is Enforceable*

After determining the material terms of the 2008 plea agreement, the court should then determine if that agreement is enforceable. In the superior court, Goolsby asserted that even if the 2008 plea agreement consists of an unauthorized sentence (because it provides for a concurrent term and/or presentence credits), the court should specifically enforce the agreement because (a) the Department waited more than seven years to raise these issues; (b) Goolsby detrimentally relied on the term being concurrent; and (c) in denying his request for a reporter's transcript of sentencing, the superior court stated that the 2008 prison term was concurrent, and this decision is binding.

In sentencing Goolsby in 2017, the trial court did not rule on whether the 2008 plea agreement could be specifically enforced. If he so requests, Goolsby should be afforded the opportunity of presenting these arguments for resolution in the trial court.

If the trial court determines that the 2008 plea agreement is unenforceable because it provides for (1) a two-year concurrent term in contravention to section 4502,

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<sup>14</sup> When sentencing Goolsby in 2017, the trial court stated that based on the reporter's transcript from the change of plea hearing, Goolsby agreed to a consecutive term. However, Goolsby's declaration explains why he consented to a consecutive term at the change of plea hearing and how that was changed to a concurrent term at sentencing. Accordingly, the trial court should consider this issue anew, in light of the admissible evidence adduced at an evidentiary hearing. Nothing in this opinion precludes the trial court from reaching the same conclusion after such hearing.

subdivision (a), and/or (2) presentence credits in contravention of *Rojas, supra*, 23 Cal.3d 152, then the court should afford Goolsby the opportunity to withdraw that plea and either go to trial on the 2008 case or agree to another plea bargain with a legally authorized sentence. (*Williams, supra*, 83 Cal.App.4th at p. 945 [" 'Since the plea bargain cannot be carried out according to its terms, the orders entered on the basis of the plea bargain must be vacated.' "]; *People v. Jackson* (1981) 121 Cal.App.3d 862, 869 (*Jackson*) ["That portion of the plea bargain having become impossible . . . to perform, the trial court had no alternative but to permit defendant to withdraw his pleas of guilty."].)

### III. ISSUES RELATING TO THE 2017 PLEA AGREEMENT

#### A. *The Court Should Conduct an Evidentiary Hearing to Determine Whether Presentence Credits and No Restitution Fine Are Terms of the 2017 Plea Agreement*

The parties dispute whether the 100 days of presentence credit that the court awarded in the 2017 case is a material term of that plea agreement. The parties also dispute whether a stay on the restitution fine is a material term of the 2017 plea agreement. The trial court should conduct an evidentiary hearing to resolve these factual disputes and determine the material terms of the 2017 plea agreement.<sup>15</sup>

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<sup>15</sup> We reject the Attorney General's contention that Goolsby forfeited any claim of error with respect to the restitution fine by not objecting to its imposition in the trial court. Goolsby had no reason to object because the trial court told Goolsby that although it was required to order the restitution fine, Goolsby did not have to pay it. Goolsby had no reason to know that the court would later lift the stay and impose the fine on an ex parte basis.

*B. The Court Should Conduct an Evidentiary Hearing to Determine if Compelling and Extraordinary Reasons Exist to Not Impose a Restitution Fine*

The trial court stayed the restitution fine, finding there was "good cause" to not require Goolsby to pay it. In so doing, the court applied an incorrect legal standard. Under section 1202.4, subdivision (b), the court must impose a restitution fine "unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record." Under subdivision (c) of that statute, "A defendant's inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution fine."<sup>16</sup>

When an unlawful sentencing decision is made (here, staying the restitution fine without a finding of compelling and extraordinary reasons), "the proper course of action is to allow the trial court to lawfully exercise its discretion and impose a lawful sentence." (*People v. Woods* (2010) 191 Cal.App.4th 269, 273.) Accordingly, on Goolsby's request, the trial court should conduct an evidentiary hearing to determine whether compelling and extraordinary reasons for not imposing a restitution fine exist and, if so, make appropriate findings on the record.

*C. If the Trial Court Determines That the 2017 Plea Agreement Provides for an Unauthorized Sentence, the Court Should Provide Goolsby the Opportunity to Withdraw the Plea or Enter into a New Agreement with an Authorized Sentence*

If the court determines (1) that presentence credits were a material term of the 2017 plea agreement and constitute an unlawful part of the plea agreement; and/or (2) a

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<sup>16</sup> Before oral argument, Goolsby's attorney gave notice that she intended to rely on the recently decided case, *People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1172, which holds under due process principles that a restitution fine under section 1202.4 must be stayed "until and unless the People demonstrate that the defendant has the ability to pay the fine." Goolsby may raise this issue in the superior court on remand.

material term of the 2017 plea agreement was that the court would not impose a restitution fine, and there are no compelling and extraordinary reasons to not impose such fine, then the court must afford Goolsby the opportunity to withdraw the 2017 plea and go to trial on the 2017 charges or agree to a different plea agreement with a legally authorized sentence. (*Williams, supra*, 83 Cal.App.4th at p. 945; *Jackson, supra*, 121 Cal.App.3d at p. 869.)

*D. If the Court Determines That the 2017 Plea Agreement Provides for An Authorized Sentence, the Court Should Sentence According to That Agreement*

If the court determines that the material terms of the 2017 plea bargain constitute an authorized sentence, then the court should impose sentence in a manner consistent with such terms.

*E. The Court Should Allow Goolsby to Contest Imposition of the Booking Fee*

In sentencing Goolsby in April 2017, the trial court imposed and then stayed a \$154 booking fee under Government Code section 29550. The amended abstract of judgment filed on July 20, 2017, accurately reflected this aspect of Goolsby's sentence by providing that "all fines and fees are STAYED . . . ."

A stay of the booking fee does not require a finding of compelling and extraordinary reasons and in determining whether to impose a booking fee the defendant's ability to pay may be an appropriate factor for consideration. (Gov. Code, § 29550, subd. (d)(2).) Nevertheless, after issuing the ex parte order imposing the restitution fine, the clerk filed a second amended abstract of judgment on October 24, 2017, that imposed the \$154 booking fee and omitted the stay of fees and fines.

On appeal Goolsby contends the booking fee should be stricken because he was already in custody when he committed the 2017 offenses and, therefore, the government incurred no recoverable booking expenses. The Attorney General contends Goolsby has forfeited this issue by failing to object to the booking fee in the trial court and, in any event, recoverable costs under Government Code section 29950, subdivision (c) include booking someone already in custody.<sup>17</sup>

We reject the Attorney General's forfeiture argument. At the April 2017 sentencing hearing, the court told Goolsby that he did not have to pay the booking fee, stating, "I'm going to order him to pay a court security fee of \$40; [¶] a criminal conviction fee of \$30; [¶] [and a] \$154 booking fee. [¶] *I'm going to stay all of that pending successful completion of his supervision.*" (Italics added.) Goolsby was not aggrieved by the order staying the booking fee. He could not reasonably foresee that after an ex parte nunc pro tunc order rendered six months later, the clerk would amend the abstract of judgment to impose the booking fee. Accordingly, Goolsby had no obligation to object to the imposition and stay of the booking fee at sentencing.

On remand the court should allow Goolsby to contest the booking fee—although we reach this result on grounds other than what Goolsby argues. The court's oral pronouncement of judgment stayed the \$154 booking fee. Nothing in the court's October

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<sup>17</sup> *People v. McCullough* (2013) 56 Cal.4th 589, 591 holds that "a defendant who fails to contest the booking fee when the court imposes it forfeits the right to challenge it on appeal."

23, 2017 ex parte order purports to remove or lift that stay. The booking fee is not even addressed in the ex parte order.

Thus, Goolsby's obligation to pay the booking fee does not arise from the court's oral pronouncement of sentence or from the ex parte order—but rather from the second amended abstract of judgment. However, "the abstract of judgment is not itself the judgment of conviction, and cannot prevail over the court's oral pronouncement of judgment to the extent the two conflict." (*People v. Delgado* (2008) 43 Cal.4th 1059, 1070.) Thus, Goolsby is entitled to contest imposition of the booking fee on remand because the court ordered that fee stayed and has never changed that ruling.

## DISPOSITION

The "Ex Parte Minute Order" dated October 19, 2017, and signed by the trial court on October 23, 2017, in San Diego County Superior Court case Nos. SCD270841 and SCS218940 is vacated. The matter is remanded for resentencing in a manner consistent with the directions provided in parts II and III of this opinion. After resentencing, the clerk is directed to prepare an amended abstract of judgment in case Nos. SCD270841 and SCS218940 that accurately reflects resentencing and forward that amended abstract of judgment to the Department of Corrections and Rehabilitation.

NARES, Acting P. J.

WE CONCUR:

O'ROURKE, J.

DATO, J.